No. 87-1876

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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1. In its reply the government studiously avoids the real issue in this case.

The government's claim that it is proceeding under a different "theory" and under a different "cause of action" may explain why the government is reluctant to discuss the opinion of the Court in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981). The government is content to observe that the facts were different. What the government ignores is the admonition by the Court that "there is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*' ". 452 U.S. at 401. The Court will not countenance exceptions allegedly based on "simple justice", "ad hoc determination of the equities in a partic-

ular case". "Public policy" *Id.*, p. 401. Citing an earlier decision, the Court suggested that "the predicament in which respondent finds himself, is of his own making". *Id.*, 401. Other attempts to undermine *Federated* have been rejected by the Courts. See, Petition. p. 9.

2. Although the government virtually concedes on page 4 of its memorandum that the issue of alter ego could have been raised in the first case, it nevertheless insists that it was under no obligation to do so. Unlike the convoluted argument in its footnote (p. 4) — (the only discussion of Judge Boochever's dissent) — this was not a case of "anticipating" an issue; this was an issue that could have been raised and was allegedly available. The situation in *United States v. Southern Fabricating Co.*, 764 F.2d 780 (11th Cir. 1985), cited in its footnote, involved entirely different facts and factors, not involved here. The reference to Restatement (Second) of Judgments, Section 49 (1982) is also inapplicable. Here Convalescent figured in the first action. The government claimed in its complaint that Convalescent assumed the liability of the providers under a contract and agreement in the first action. Plainly the issue of alter ego was available. The government again ignores *Federated*. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been* raised in that action". 452 U.S. at 398 (emphasis supplied)

3. The arguments of "different theory" and "different cause of action" are plainly without merit. The evidence in the first trial in all its salient features was no different from the evidence in the second trial (Petition, p. 5). All that is now in reality being argued by the government is that a different theory was presented in the second action.

The courts have been uniform in holding that the doctrine of *res judicata* bars all grounds for recovery which could have been asserted in the original action. A party should not be able to re-litigate a matter that that party has already had the opportunity to litigate.

Moreover, if the claim asserted in the second forum arises from the same factual grouping that gave birth to the claim in the first forum, the subsequent claim is barred despite its assertion of different legal theories or request for different relief. When a single case of operative facts forms the basis of both lawsuits, different theories or different claims of relief will not avoid the bar of *res judicata*.

On the issue of "same cause of action", the government points to *Nevada v. United States*, 463 U.S. 110, 130 and No. 12 (1983). The decision in *Nevada* is directly opposed to the government's position and footnote 12 is even more so. The "transactions" approach of the Restatement, detailed in the footnote, is precisely why the cause of action below was barred by the doctrine of *res judicata*. The footnote quotes comment (b) of Section 24 of the Restatement. Comment (c) went even further: "That a number of different legal theories casting liability on an action may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief". References to other sections of the Restatement do not aid the government, under the circumstances of this case.

4. The government switches to a discussion of "collateral estoppel" (p. 5). The government does not dispute that a judgment dismissing a previous suit "with

prejudice" bars a later suit on the same cause of action. The decision cited by the government, *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955), specifically so states. The government argues however, that *Lawlor* and *U.S. v. International Bldg. Co.*, 345 U.S. 502, 505, 506 (1953) stand for the proposition that in a case involving collateral estoppel, "full and fair opportunity" to litigate and "actual obligation" are required. First, the primary issue here is *res judicata*. Second, it appears somewhat inexplicable to argue "fair opportunity" when it was the government which chose to ask for voluntary dismissal, and never appealed the dismissal as the merits or ever moved to modify or alter or vacate the judgment, dispute every suggestion to do so. Perhaps the government thought it better to pursue a "different theory", then return to the trial judge in the first case with baseless arguments of "fraud" and "bad faith." The *Lawlor* and *International Bldg. Co.* cases, in any event, do not aid the government. Successive violations after a judgment has been entered, or a pro forma acceptance of an agreement by a Tax Court, may defeat claims of collateral estoppel; such cases are irrelevant here.

5. The short of the matter is the following: (a) The government has not refuted the claim that the judgment herein is barred under the doctrine of *res judicata* in the light of the principles enunciated by the Court; (b) the government has not met the argument of Judge Boochever, the dissenting Judge below; (c) the government has made no serious attempt to support the decision of the district court; (d) the government has left unanswered the petitioner's due process argument (Pet. pp. 12-16); (e) the government has left unanswered the petitioner's argument that the case be remanded in light of the Court's supervisory jurisdiction (Pet. pp. 16-19). The case herein is therefore of vital importance. Inroads into

basic principles enunciated by the Court should not be permitted. Important constitutional issues involving due process and the power of the Court to require fair procedures in the lower courts are issues which have important significance for the entire community.

CONCLUSION

The petition for writ of certiorari should be granted, it is respectfully submitted. In the alternative the petition for certiorari should be granted and the cause remanded to the Court of Appeals with instructions to state the reasons for affirmance before final considerations by the Court.

July 29, 1988

Respectfully submitted,

LEO BRANTON, JR.
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 29, 1988, I served the within Petitioners' Reply Memorandum in re: "Associated Convalescent Enterprises, Inc. vs. United States of America" in the United States Supreme Court, October Term, 1988, No. 87-1876;

On the parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

Stephen A. Shefler
Assistant United States Attorney
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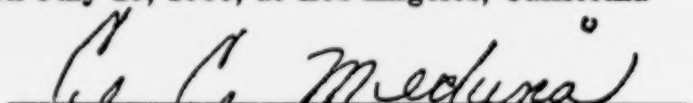
San Francisco, California 94102

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on July 29, 1988, at Los Angeles, California



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